In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1422

WELTRONIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 155, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19–25) is reported at 419 F. 2d 1120. The Board's decision and order (Pet. 25–41) are reported at 173 NLRB No. 40.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1969, and a petition for rehearing *en banc* was denied on January 22, 1970 (Pet. 2). The petition for a writ of certiorari was filed on April 14,

384-335—70

1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly concluded that the employer violated its duty to bargain under the National Labor Relations Act when it transferred work from an old facility to a new plant three miles away without first bargaining about that decision with the union representing the employees who formerly performed the work at the old plant.

2. Whether the Board, in determining the unfair labor practice charge, had jurisdiction to interpret provisions of the collective bargaining agreement relied upon by the employer as a defense to the charge.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth at page 42 of the petition.

STATEMENT

Weltronic Company, the petitioner, manufacturers, sells and distributes resistance welding controls and, since about 1960, has also produced and sold "plant central" equipment, used to monitor and control plant operations (J.A. 92, 94; 49, 50, 52, 85–86).[1] From May 1965 until April 1967, the Company manufactured some plant central equipment together with resistance

[1] "J.A." references are to the Joint Appendix filed in the court below.

welding controls at its Eight Mile Plant in Southfield, Michigan (J.A. 94; 50). While two employees performed most of the wiring and electronic assembly work on the plant central equipment, all of the Eight Mill Plant employees were assigned to various plant central jobs at one time or another. (J.A. 95; 7–8, 20–21, 26–27, 33–35, 36–37).

The employees at the Eight Mile Plant had been represented by the respondent Union since 1947 and were, during the events herein described, covered by a duly negotiated collective bargaining agreement (J.A. 92–93; 4, 6–7, 110–113). On April 1, 1967, without any notice to the Union, the Company moved the bulk of its plant central wiring and electronic assembly work out of the Eight Mile Plant to its new Telegraph Plant, three miles away (J.A. 95; 10, 13, 20, 27, 29, 33, 41–42, 47–48, 59, 60–61, 82–83). No employee was transfered from the Eight Mile Plant to the Telegraph Plant (J.A. 95; 61).

Although there were no discharges or layoffs as a result of the move, 14 employees at the Eight Mile Plant were already on layoff status when the move took place. The Company did not recall any of these individuals to work at the Telegraph Plant, even though at least some were capable of doing plant central work (J.A. 95; 39–41, 120). The Company subsequently hired 5 new, non-union employees for the Telegraph Plant at much lower rates than those specified in the contract with the Union (J.A. 96; 120, 121).

On April 14, the Union shop steward at the Eight Mile Plant filed a grievance protesting the transfer of the plant central equipment work (J.A. 96; 12–13,

42–43, 114). Representatives of the Union and the Company met to discuss the grievance, but could not resolve it and the Union requested arbitration (J.A. 96; 13–16). The Company initially agreed, but then changed its mind, stating its position in a letter to the Union, dated April 26:

> You have requested that we negotiate and arbitrate the question of whether we have the right to establish a Plant Central Division at 20905 Telegraph Road, Southfield, Michigan, without transferring the employees who worked on Plant Central at 19500 West Eight Mile Road, Southfield, Michigan to a new location.
>
> Our contract does not provide for negotiation or arbitration of any management rights matters and it does provide that we retain all management rights, including the determination of the location of plants.[2] The contract does not provide for transferring any employees to a new location unless we discontinue operations at 19500 West Eight Mile Road, Southfield, Michigan.

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[2] The management rights clause referred to by the Company, contained in Article I, Section 4 of the contract, read as follows (J.A. 110–111):

"The Union agrees that the Management of the Company has the right to manage the affairs of the business, to control its properties, and equipment, and to direct the working forces of the Company in accordance with and subject to the terms of this Agreement. Said functions of Management include the right to hire, discharge or discipline for just cause, to establish new jobs and discontinue jobs, maintain discipline and efficiency of employees, to determine the type of products to be manufactured, the location of plants, plan scheduling of production, methods, processes, and means of manufacturing."

> For the above reasons, we decline to negotiate or arbitrate the question referred to in paragraph one hereof. [J.A. 97; 15, 115.]

The Union filed another grievance dated May 5, which stated that the Company had violated various provisions of the contract "by refusing to negotiate the moving of this work" (J.A. 97; 15, 116).[3] The Company refused to meet on this grievance, stating that relocation was "a matter reserved as a management right," and also denied a subsequent Union request to discuss the problem declaring that it could "see no reason for further correspondence in the matter" (J.A. 97; 15, 117–119). The Union then filed charges with the Board, alleging that the Company had refused to bargain in violation of the National Labor Relations Act.

On the facts set forth above, the Board held that the Company violated Section 8(a)(5) and (1) of the Act by transferring unit work from its Eight Mile Plant to its Telegraph Plant without first notifying the Union and giving it an opportunity to bargain thereon,[4] by treating the plant central work as no longer covered by the contract, by paying employees rates less than those provided for in its contract with the Union, and by refusing to negotiate with the Union about the transfer of unit employees to, or the recalling of laid off employees for work, at, the Tele-

[3] The provisions of the contract referred to by the Union—Article I, Sections 1(b) and 2, and Article IV—are set forth at Pet. 21–22 and J.A. 110.

[4] The Board found that the Union, by agreeing to the management rights clause in the contract, did not waive its right to bargain about the relocation of unit work (Pet. 36).

graph Plant (Pet. 26, 37). The Board ordered the Company to bargain with the Union respecting the transfer of work and, pending the outcome of the bargaining, (1) to give the employees who previously performed plant central work at the Eight Mile Plant an opportunity to continue to perform such work, and (2) to apply the terms of the collective bargaining agreement to the plant central work retroactively to the date of transfer of such work, including the recall and reimbursement for lost earnings of laid off employees who were affected by the Company's unilateral action. The Board's order gives the Company the option of either moving the plant central work back to the Eight Mile Plant or retaining it at the Telegraph Plant, so long as it otherwise complies with the good faith bargaining obligation imposed by the order. (Pet. 26–27, 38–41.)

On the Company's petition for review, the court of appeals enforced the Board's order (Pet. 25), noting that, "[w]hile the Board is not empowered to adjudicate the rights of parties covered under a collective bargaining agreement, it does have the right to determine by reference to the agreement whether one of the parties has agreed to relinquish a statutory safeguard" (Pet. 23).

ARGUMENT

1. In *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, this Court held that an employer violated his duty to bargain under the National Labor Relations Act when, without first negotiating with the union representative, it contracted out maintenance work previously performed by its employees to an independent contractor. The

court of appeals correctly concluded that the *Fibreboard* decision governed the factual situation here. The Company admittedly transferred the plant central work from the Eight Mile Plant to the Telegraph Plant without first bargaining with the Union either about the transfer decision or its effect upon the unionized employees. The transfer did not alter the Company's basic operation as it continued to manufacture plant central equipment at the new location by employing lower-paid non-union workers. The reason offered by the Company for the transfer—to achieve greater efficiency and economies—raised matters, as the Court noted in *Fibreboard,* "peculiarly suitable for resolution within the collective bargaining framework" (379 U.S. at 214). Finally, the transfer had an impact on the bargaining unit since the company was less likely, following the transfer, to recall any of the 14 employees on layoff status. See *Auto Workers* v. *National Labor Relations Board,* 381 F. 2d 265, 266 (C.A. D.C.), certiorari denied, 389 U.S. 857.

The cases relied on by petitioner are not inconsistent with the decision below. In *Puerto Rico Telephone Co.* v. *National Labor Relations Board,* 359 F. 2d 983 (C.A. 1), the court found that the subcontracting out of work attacked by the union did not adversely affect the bargaining unit, since the number of jobs in the unit had actually increased. The validity of the Second Circuit's pre-*Fibreboard* decision in *National Labor Relations Board* v. *Rapid Bindery, Inc.,* 293 F. 2d 170 (C.A. 2), which involved a plant closing and not a transfer of work as here, has since been questioned by that court. See *Genesco, Inc.* v. *Joint Council 13, United Shoe Workers,* 341 F. 2d 482, 488. Even *Rapid Bindery,* while

finding no bargaining requirement with respect to the decision to close down a plant, imposed a duty to bargain about the effects of that decision on the employees involved. Two other cases cited by the petitioner, *National Labor Relations Board* v. *Spun-Jee Corp.*, 385 F. 2d 379, 383–384 (C.A. 2), and *National Labor Relations Board* v. *Cone Mills Corp.*, 373 F. 2d 595, 600–601 (C.A. 4), merely hold that unions had waived their bargaining rights; there was no such waiver here.

2. Contrary to petitioner's remaining contention, the Board was authorized to interpret the collective bargaining contract to determine whether there was an unfair refusal to bargain. See *National Labor Relations Board* v. *C & C Plywood Corp.*, 385 U.S. 421; *National Labor Relations Board* v. *Joseph T. Strong*, 393 U.S. 357, 360–362.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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